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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE BUSTAMANTE CORDERO,

Defendant and Appellant.

F045153

(Super. Ct. No. BF105027A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

William Davies, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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*Before Dibiaso, Acting P.J., Buckley, J. and Wiseman, J.

PROCEDURAL AND FACTUAL HISTORIES

On January 19, 2004, defendant was stopped while driving a vehicle with an expired registration tag. Defendant, whom the officer confirmed was on parole for auto theft, consented to a search of his vehicle. While searching defendant, a small bundle fell from his pants leg. Within a short time, two other bundles escaped from defendant's pants leg. In addition, a glass pipe used for smoking methamphetamine was located in his coat pocket. The contraband seized was later determined to be 2.14 grams of a substance containing methamphetamine.

Defendant entered a no contest plea to one felony count of possession of methamphetamine in violation of Health and Safety Code section 11377. He also admitted a strike prior pursuant to Penal Code section 667, subdivision (e). The strike prior arose from defendant's previous conviction of violating Vehicle Code section 10851, subdivision (a), coupled with a Penal Code section 186.22, subdivision (b)(1), gang enhancement. In exchange, a felony charge alleging forgery (Pen. Code, § 476) and a misdemeanor charge alleging possession of narcotics paraphernalia (Health & Saf. Code, § 11364) were dismissed, conditioned upon the plea remaining in effect. Further, defendant was to receive no more than 32 months in prison.

The plea agreement apparently allowed defendant to request the dismissal of the strike prior at the sentencing hearing. He did so, arguing that Vehicle Code section 10851 (taking a vehicle) is not an enumerated serious felony under the three strikes law and therefore cannot count as a strike. The court denied the request, relying on the gang enhancement: "It's my understanding that if there's a [Penal Code section] 186.22, subsection (b)(1) allegation, that conviction becomes a strike." Defendant's counsel noted that the question of whether a crime that does not otherwise qualify as a strike becomes a strike because of a gang enhancement was then pending before the California Supreme Court. The court acknowledged this and denied the request to strike "without prejudice." "If there's some change in the law, of course[,]"

the court continued, “you can bring it back for resentencing” The court sentenced defendant to 32 months.

DISCUSSION

Defendant now repeats his argument that Vehicle Code section 10851 is not among the serious or violent felonies enumerated in the pertinent section of the three strikes law, Penal Code section 1192.7. We disagree and affirm.

Penal Code section 1192.7, subdivision (c)(28), brings within the three strikes law any prior “felony offense, which would also constitute a felony violation of Section 186.22” The question is whether a felony that is merely enhanced under Penal Code section 186.22, subdivision (b)(1), because of its connection with a gang (as opposed to a felony that is a substantive offense under Penal Code section 186.22) “constitute[s] a felony violation of Section 186.22” for purposes of the three strikes law.

The case pending before the Supreme Court at the time of sentencing, *People v. Briceno* (2004) 34 Cal.4th 451, has since decided this question in the affirmative. *Briceno* unanimously held that the definition of a “serious felony” as described in Penal Code section 1192.7(c)(28) includes any felony offense committed for the benefit of a criminal street gang as defined in Penal Code section 186.22, subdivision (b)(1). (*Briceno, supra*, 34 Cal.4th at p. 456.) Consequently, defendant’s admission of a violation of Vehicle Code section 10851, subdivision (a), coupled with a Penal Code section 186.22, subdivision (b)(1), gang enhancement constitutes a serious felony as required by Penal Code section 1192.7, subdivision (c)(28). The trial court properly denied defendant’s motion to dismiss the strike prior.

In light of this conclusion, we need not address the People’s argument that this appeal amounts to an impermissible effort to attack the plea agreement. Accordingly, the People’s motion to dismiss the appeal is denied.

DISPOSITION

The judgment is affirmed.